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Subcommittee on the Constitution and Civil Justice

Hearing on
The Voting Rights Act
After the Supreme Court's Decision
in *Shelby County*

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Chairman Franks, Ranking Member Nadler, and Members of the House Judiciary Subcommittee on the Constitution and Civil Justice:

I appreciate the opportunity to testify today regarding the Voting Rights Act after the U.S. Supreme Court's decision in *Shelby County v. Holder*.[1] I am a tenured Professor of Law at The George Washington University Law School. I regularly teach a voting law course, and in previous years I have taught courses on civil rights and the law of democracy generally. My scholarship focuses on voting rights and other election law issues. I am also a Senior Fellow at Demos. From 2009-2010, I served as Principal Deputy Assistant Attorney General for Legal Policy at the U.S. Department of Justice, where I worked on various policy issues, including policies related to the Voting Rights Act, the Military and Overseas Voter Empowerment Act, and the National Voter Registration Act.

Shelby County **Invalidated Coverage Formula Referencing 1960s and 1970s Data**

In *Shelby County*, the Court held unconstitutional the Section 4(b) coverage formula that determined which jurisdictions must comply with the preclearance requirements of Section 5 of the Voting Rights Act.

Section 5 requires federal preclearance of changes affecting voting in "covered" jurisdictions before the changes are implemented. Section 4(b) as originally adopted and updated provided formulas that identified as "covered" jurisdictions with a voting test or device and less than 50 percent voter registration or turnout in the 1964, 1968, or 1972 general Presidential elections.[2]

In *Shelby County*, the Court stated "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets," and that "current burdens…must be justified by current needs."

The Court believed that *in the past* the 4(b) coverage formula based on tests and low turnout from 1964, 1968, and 1972 elections was "sufficiently related to the problem,"—that it was "rational in both practice and theory," "reflected those jurisdictions uniquely characterized by voting discrimination," and "link[ed] coverage to the devices used to effectuate discrimination." The Court observed that "[t]he formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both."

In contrast, the Court believed that the coverage formula based on 1964, 1968, and 1972 turnout and tests was not tailored to address discrimination *today*. The Court noted that Congress altered the coverage formula in 1970 (adding counties in California, New Hampshire, and New York), and 1975 (adding the States of Alaska, Arizona, and Texas, and several counties in six other states), but not in 1982 or 2006. Specifically, the Court stated:

[1] 133 S.Ct. 2612 (2013).

[2] In 1975 "test or device" was amended to include areas that provided English-only voting materials where at least five percent of voting-age citizens were members of a single language minority group.

> Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since.

The Court did not believe that the record Congress amassed in 2006 establishing vote dilution and other discriminatory practices was tied to text of a coverage formula based on turnout, registration rates, and tests from the 1960s and 1970s. Specifically, the Court reasoned:

> Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40–year–old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution…. [W]e are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The Court explicitly limited its holding to the 4(b) coverage formula based on election data from the 1960s and 70s, and stated that "Congress may draft another formula based on current conditions."

While the Court observed that states generally regulate state and local elections and that federal preclearance is "extraordinary," the Court did not find the Section 5 preclearance process unconstitutional. Instead, it explicitly recognized that "voting discrimination still exists," that "any racial discrimination in voting is too much," and that Congress has the power to enforce the Fifteenth Amendment to prevent voting discrimination. Further, the Court's decision did not affect Section 3(c) of the Voting Rights Act, which allows federal courts to order preclearance as a remedy for violations of the Fourteenth or Fifteenth Amendment (commonly known as "bail in").

Section 2 Litigation Inadequate Substitute for Loss of Preclearance

While the holding in *Shelby County* was limited to invalidating the coverage formula, the decision has a significant impact. It effectively suspends Section 5 preclearance in all jurisdictions other than the handful currently subject to a Section 3(c) "bail in" court order. Absent Congressional action that updates the Act, it will be more difficult to prevent and deter political operatives from manipulating voting rules based on race.

Some have asserted that Section 5 is unnecessary because the Department of Justice or private parties can bring a lawsuit under Section 2 of the Voting Rights Act. This is wrong. While Section 2 is important, litigation is an inadequate substitute for the Section 5 preclearance process.

Litigation Not Comprehensive: Preclearance was comprehensive—it *deterred* jurisdictions from adopting many unfair election rules because officials knew every decision would be reviewed. In contrast, litigation requires that plaintiffs have the information and resources to bring a claim, and therefore litigation misses a lot of under-the-radar manipulation. Even states and localities that post new bills online or are subject to freedom-of-information laws generally do not disclose the unfair aspects of their voting changes.

Litigation More Expensive: Preclearance also put the burden to show a change was fair on jurisdictions—which enhanced efficiencies because jurisdictions generally have better access to information about the purpose and effect of their proposed election law changes. Litigation shifts the burden to affected citizens—who must employ experts and lawyers who fish for information during drawn-out discovery processes. This drives up the cost of compliance to the Department of Justice, to affected citizens, and to jurisdictions.

Litigation Not Tailored to Non-Dilution Claims: Section 2 has well-developed standards to challenge unfair minority vote dilution in the context of at-large elections and racially-gerrymandered election district boundaries. The litigation standards, however, are not sufficiently developed to address non-dilution claims such as challenges to voting locations and candidate qualification procedures. In contrast, the Section 5 retrogression standard was well-suited to address non-dilution claims.

Preclearance Protects Voting Rights in Local Elections: The preclearance process was particularly valuable in local elections, which are often nonpartisan. While national media outlets and political pundits may focus on voting rules that affect federal and state offices, the unfair manipulation of local election rules is a significant problem. At least 86.4% of all unfair election changes blocked by preclearance since 2000 *would not* have affected federal elections. That's because even when federal, state, and local elections are conducted at the same time, many important changes are confined to the local level, including local redistricting, annexations, and changes to candidate qualifications, the method of elections, and the structure of government.

In Nueces County, Texas, for example, the rapidly-growing Latino community surpassed 56% of the county's population, and in response county officials gerrymandered local election districts to dilute the votes by Latinos.

Without Section 5 protections to block this type of racial manipulation, Americans in many areas like Nueces County will not have the thousands and sometimes millions of dollars needed to bring a lawsuit to stop these unfair changes. Further, much of this local manipulation will not attract significant national media attention and will go unchallenged.

Bail-In Currently Inadequate: The Section 3(c) bail-in process is insufficient to address the problems above because it currently requires a finding of intentional discrimination. Courts often find voting rights violations based on effects without explicitly finding that a jurisdiction engaged in intentional discrimination. Evidentiary problems with proving intentional discrimination drive up litigation costs for the Department of Justice, aggrieved voters, and jurisdictions. Bail-in is often a good solutions-oriented remedy for all parties, but

currently bail-in consent decrees generally require that a jurisdiction sign a decree that acknowledges it engaged in unconstitutional activity (intentional discrimination), and the stigma of intentional discrimination can sometimes deter otherwise constructive agreements.

Significant Voting Discrimination Persists: Too many political operatives in previously covered jurisdictions continue to maintain power by unfairly manipulating voting rules based on how voters look or speak. Congress determined as much during the last reauthorization, and such discrimination has occurred since that time in various jurisdictions like Nueces County, Texas. While the Court in *Shelby County* invalidated the coverage formula because it was based on data from the 1960s and 1970s, the Court acknowledged that "voting discrimination still exists" and that "any racial discrimination in voting is too much."

Conclusion

In the last 50 years we have made significant progress on voting rights. Unfortunately, after *Shelby County v. Holder* political operatives have more opportunity to unfairly manipulate election rules based on race. The Court in *Shelby County* stated that the purpose of the Fifteenth Amendment is "to ensure a better future," but the future will be worse if Congress fails to act.

Fortunately, Congress has the power to prevent discrimination and update the Voting Rights Act. An updated Voting Rights Act will help not just voters of color, but our nation as a whole. Protecting voting rights provides legitimacy to our nation's efforts to promote democracy and prevent corruption around the world. We all agree that racial discrimination in voting is wrong, and Congress should update the Voting Rights Act to ensure voting is free, fair, and accessible for all Americans.